

STATE OF MICHIGAN
COURT OF APPEALS

JANET ROEBUCK-WAGNER and DAVID
WAGNER,

Plaintiffs-Appellants,

v

DENNIS W. GREEN, D.P.M., and
PROFESSIONAL FOOT & ANKLE
CENTER, P.C.,

Defendants-Appellees.

UNPUBLISHED

January 10, 2006

No. 262754

Genesee Circuit Court

LC No. 02-074351-NH

Before: O’Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order striking their affidavit of merit in this podiatry malpractice action and granting summary disposition on grounds that the statute of limitations had expired. Plaintiffs also challenge an earlier order granting defendants’ motion in limine to bar the testimony of the same expert who executed the affidavit of merit. We reverse the trial court’s grant of summary disposition in favor of defendants, affirm the order granting defendants’ motion in limine, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

MCL 600.2912d(1) requires that a plaintiff initiating a medical malpractice action file an affidavit of merit that is “signed by a health professional who the plaintiff’s attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169].” With the complaint, plaintiffs filed an affidavit of merit executed by Steven Spinner, D.P.M., of Plantation, Florida. Dr. Spinner’s deposition established that he was of the opinion that a national standard of care applied to podiatrists, and he did not profess to know the local standard of care. However, *Jalaba v Borovoy*, 206 Mich App 17, 21; 520 NW2d 349 (1994), establishes that a local standard of care applies to podiatrists. MCL 600.2912a(1)(b) states that a plaintiff has the burden of proving that a specialist “failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances”

Defendants argued that the affidavit of merit should be struck because it was signed by someone who was not qualified as an expert witness. Defendants further asserted that the affidavit of merit did not toll the statute of limitations, and that the limitations period had run.

Plaintiffs' counsel responded that he had a reasonable belief that Dr. Spinner was qualified, asserting that he practiced in a similar, large metropolitan community. The trial court concluded that plaintiffs had failed to establish the similarity of the communities.

Based on *Sturgis Bank & Trust Co v Hillsdale Community Health Center*, ___ Mich App ___, ___ NW2d ___ (2005), we conclude that the trial court erred in focusing on Dr. Spinner's inability to testify regarding the local standard of care for purposes of deciding the affidavit of merit question. In *Sturgis, supra*, this Court held that the reference in MCL 600.2912d(1) to MCL 600.2169 was intended to mean only subsection 1 of MCL 600.2169, and *not* to subsection 2, which deals with evaluating an expert's qualifications, including the relevancy of the testimony. MCL 600.2169(1)(c) provides:

(c) If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) Active clinical practice as a general practitioner.

(ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed.

In this case, plaintiffs established that at the time Dr. Spinner prepared the affidavit of merit he was the director of podiatric medical education and residency training at Plantation General Hospital. He also held positions with Outpatient Surgical Services, Inc., and was the director of podiatric medical services at Physicians Consultant and Management Corporation, Innovative Clinical Solutions, Ltd. These qualifications made him eligible under MCL 600.2169(1) to execute the affidavit of merit required by MCL 600.2912d(1). Accordingly, the trial court erred in granting the defendants' motion to strike and for summary disposition.

Nonetheless, we find no abuse of discretion in the trial court's decision to bar Dr. Spinner from testifying at trial. See *Clerc v Chippewa Co War Memorial Hospital*, 267 Mich App 597, 601; 705 NW2d 703 (2005). In determining an expert's qualifications under MCL 600.2169(2)(d), the trial court must evaluate the relevancy of the expert's testimony. Under MCL 600.2912a, the expert's testimony against a podiatrist would be relevant if it showed that the defendant failed to provide "the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community. . . ." Regardless of whether Dr. Spinner was from a similar community, he was of the opinion that a national standard of care applied to podiatrists. His deposition demonstrates that he was prepared to testify that defendants breached this national standard, but not that defendants breached a local standard or the standard of a community similar to the locality in which they practiced. Given this limitation, it cannot be said that the trial court abused its discretion in determining that Dr. Spinner's qualifications to testify were not established.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Michael R. Smolenski

/s/ Michael J. Talbot